

The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

BEL LEWIS RIDGE, LLC,  
Plaintiff,  
v.  
CERTAINTEED CORPORATION,  
Defendant.

CASE NO. 3:19-cv-05587-BHS-MAT

[PROPOSED] AGREEMENT  
REGARDING DISCOVERY OF  
ELECTRONICALLY STORED  
INFORMATION AND ORDER

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

## A. General Principles

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the

1 proportionality standard in discovery, requests for production of ESI and related responses should  
2 be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the  
5 parties, each party shall disclose:

6 1. Custodians. The five custodians most likely to have discoverable ESI in their  
7 possession, custody or control. The custodians shall be identified by name, title, connection to the  
8 instant litigation, and the type of the information under his/her control.

9 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
10 drives, servers, etc.), if any, likely to contain discoverable ESI.

11 3. Third-Party Data Sources. A list of third-party data sources, if any, likely  
12 to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud”  
13 storage, etc.) and, for each such source, the extent to which a party is (or is not) able to preserve  
14 information stored in the third-party data source.

15 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable  
16 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically  
17 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ.  
18 P. 26(b)(2)(B). [Section (C)(3)(a)(i) below sets forth data sources and ESI which are not  
19 required to be preserved by the parties. Those data sources and ESI do not need to be included  
20 on this list.]

21 **C. Preservation of ESI**

22 The parties acknowledge that they have a common law obligation to take reasonable and  
23 proportional steps to preserve discoverable information in the party’s possession, custody or  
24 control. With respect to preservation of ESI, the parties agree as follows:  
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1       1.     Absent a showing of good cause by the requesting party, the parties shall not  
2 be required to modify the procedures used by them in the ordinary course of business to back-  
3 up and archive data; provided, however, that the parties shall preserve all discoverable ESI in  
4 their possession, custody or control.

5       2.     All parties shall supplement their disclosures in accordance with Rule 26(e)  
6 with discoverable ESI responsive to a particular discovery request or mandatory disclosure  
7 where that data is created after a disclosure or response is made (unless excluded under (C)(3)  
8 or (D)(1)-(2) below).

9       3.     Absent a showing of good cause by the requesting party, the following  
10 categories of ESI need not be preserved:

- 11       a.     Deleted, slack, fragmented, or other data only accessible by  
12 forensics.
- 13       b.     Random access memory (RAM), temporary files, or other  
14 ephemeral data that are difficult to preserve without disabling the  
15 operating system.
- 16       c.     On-line access data such as temporary internet files, history, cache,  
17 cookies, and the like.
- 18       d.     Data in metadata fields that are frequently updated automatically,  
19 such as last-opened dates (see also Section (E)(5)).
- 20       e.     Back-up data that are substantially duplicative of data that are  
21 more accessible elsewhere.
- 22       f.     Server, system or network logs.
- 23       g.     Data remaining from systems no longer in use that is unintelligible  
24 on the systems in use.
- 25       h.     Electronic data (e.g. email, calendars, contact data, and notes) sent  
26 to or from mobile devices (e.g., iPhone, iPad, Android, and  
Blackberry devices), provided that a copy of all such electronic  
data is routinely saved elsewhere (such as on a server, laptop,  
desktop computer, or “cloud” storage).
- 27       i.     Any other categories of ESI that the parties later agree in writing  
do not need to be preserved.

1   **D.      Privilege**

2           1.     With respect to privileged or work-product information generated after the filing  
3 of the complaint, parties are not required to include any such information in privilege logs.

4           2.     Activities undertaken in compliance with the duty to preserve information are  
5 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

6           3.     Pursuant to Fed. R. Evid. 502(d), the production of any documents in this  
7 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,  
8 constitute a waiver by the producing party of any privilege applicable to those documents,  
9 including the attorney-client privilege, attorney work-product protection, or any other privilege or  
10 protection recognized by law. Information produced in discovery that is protected as privileged  
11 or work product shall be immediately returned to the producing party, and its production shall not  
12 constitute a waiver of such protection.

13          4.     Privilege Log Based on Metadata. The parties agree that privilege logs shall  
14 include a unique identification number for each document and the basis for the claim (attorney-  
15 client privileged or work-product protection). For ESI, the privilege log may be generated using  
16 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title  
17 and date created. Should the available metadata provide insufficient information for the purpose  
18 of evaluating the privilege claim asserted, the producing party shall include such additional  
19 information as required by the Federal Rules of Civil Procedure.

20       **E.      ESI Discovery Procedures**

21          1.     On-site inspection of electronic media. Such an inspection shall not be permitted  
22 absent a demonstration by the requesting party of specific need and good cause or by agreement  
23 of the parties.

24          2.     Search methodology. The parties shall timely attempt to reach agreement on  
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1 appropriate search terms, or an appropriate computer- or technology-aided methodology, before  
2 any such effort is undertaken. The parties shall continue to cooperate in revising the  
3 appropriateness of the search terms or computer- or technology-aided methodology. In the  
4 absence of agreement on appropriate search terms, or an appropriate computer- or technology-  
5 aided methodology, the following procedures shall apply:

- 6 a. A producing party shall disclose the search terms or queries, if any,  
7 and methodology that it proposes to use to locate ESI likely to  
contain discoverable information. The parties shall meet and confer  
to attempt to reach an agreement on the producing party's search  
terms and/or other methodology.
- 9 b. If search terms or queries are used to locate ESI likely to contain  
10 discoverable information, a requesting party is entitled to no more  
11 than 5 additional terms or queries to be used in connection with  
further electronic searches absent a showing of good cause or  
agreement of the parties. The 5 additional terms or queries, if any,  
12 must be provided by the requesting party within 14 days of receipt  
13 of the producing party's production.
- 14 c. Focused terms and queries should be employed; broad terms or  
15 queries, such as product and company names, generally should be  
avoided. Absent a showing of good cause, each search term or query  
16 returning more than 250 megabytes of data is presumed to be  
overbroad, excluding Microsoft PowerPoint files, image and audio  
files, and similarly large file types.
- 17 d. The producing party shall search both non-custodial data sources  
18 and ESI maintained by the custodians identified above.

19 3. Format. The parties agree that ESI will be produced to the requesting party with  
20 searchable text, in a format to be decided by the parties. Acceptable formats include, but are not  
21 limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file), single-  
22 page TIFFs (only with load files for e-discovery software that includes metadata fields identifying  
23 natural document breaks and also includes companion OCR and/or extracted text files), and  
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1 searchable PDF. Unless otherwise agreed to by the parties, files that are not easily converted to  
2 image format, such as spreadsheet, database and drawing files, should be produced in native  
3 format.

4       4.     De-duplication.   The parties may de-duplicate their ESI production across  
5 custodial and non-custodial data sources after disclosure to the requesting party.

6       5.     Metadata fields. If the requesting party seeks metadata, the parties agree that only  
7 the following metadata fields need be produced: document type; custodian and duplicate  
8 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file  
9 path; date and time created, sent, modified, redacted and/or received; confidential designations;  
10 and hash value. Beginning and ending Bates numbers shall be stamped on the production images,  
11 and the first and last production Bates numbers of the first and last documents in a family shall be  
12 produced if possible.

13  
14 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.  
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16 DATED this 14th day of October, 2019.  
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18                    */s Kevin S. MacDougall*  
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## ORDER

Based on the foregoing, IT IS SO ORDERED.

Dated this 17th day of October, 2019.

  
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Mary Alice Theiler  
United States Magistrate Judge

**AGREEMENT REGARDING DISCOVERY OF  
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